OCT 13 1954
HAROLD B. WILLEY,

No. 413

IN THE

Supreme Court of the United States

October Term, 1954

KINNEAR-WEED CORPORATION, *Petitioner*,
v.
HUMBLE OIL AND REFINING COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES ~~CIRCUIT~~ COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES ~~CIRCUIT~~ COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on July 21, 1954.

Citations to Opinions Below

The memorandum order of the court, of the United States District Court for the Eastern District of Texas, (R. 140-141) and, memorandum order of the court, of the

United States District ~~of Texas~~ Court, (R. 186-188). Final Judgment (R. 188-190). The opinion of the ~~Circuit~~ Court of Appeals (R. 201-210).

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 21, 1954 (R. 211). Rehearing was denied on August 31, 1954 (R. 232). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. Decisions of the Trial Court and the Court of Appeals in this case are based upon questions over which neither had jurisdiction, as the questions which each passed upon were not matters before the respective courts in the Motion To Strike made by the Respondent in the Trial Court initiating the Proceedings from which Review by Writ of Certiorari should be granted to Petitioner to obtain equal and just protection under the Constitution of the United States and the law of the land.

2. Respondent has admitted in its briefs before the Trial Court and the Court of Appeals in this case, that Respondent is charged by Petitioner with violation of the Anti-Trust or Monopoly Laws of the United States in Paragraph 12 of Plaintiff's Complaint (R. 92), by alleging wrong to Plaintiff and having a planned policy to wrong the public, as follows: "Defendant is accused of not only wronging this Plaintiff but of having a planned policy to wrong the public." Thus Respondent under Rule 8(a) of the FEDERAL RULES OF CIVIL PROCEDURE admits notice giving has been given to Respondent under Paragraph 12 of Petitioner's Complaint, and Respondent further recognizes and

admits Petitioner's well-pleaded allegations of violations of the Anti-Trust and Monopoly Laws of the United States by the Filing of Respondent's Motion To Strike Paragraph 12 of Petitioner's Complaint.

3. Respondent states in its Brief (R. 92) under Respondent's Point III as follows: "Paragraph 12 of the Plaintiff's Complaint charges defendant with Criminal Acts." Thus Respondent under Rule 8(a) of the FEDERAL RULES OF CIVIL PROCEDURE admits notice giving has been given to Respondent under Paragraph 12 of Petitioner's Complaint and Respondent further recognizes and admits Petitioner's well pleaded allegations of violations of the Anti-Trust or Monopoly Laws of the United States upon the filing of Respondent's Motion To Strike Paragraph 12 of Petitioner's Complaint.

4. Inventions and improvements and/or patents are of great public interest, and all violations of the law concerning same should be tried by the courts on their merits instead of on the pleadings, and the Trial Court and the Court of Appeals erred in holding otherwise in the instant case.

5. Violations of the Anti-Trust or Monopoly Laws of the United States are of great public interest and should be heard by the courts in order to aid in the enforcement thereof and this private suit therefore should be encouraged for the better enforcement of said laws, the Trial Court and the Court of Appeals having failed to recognize and apply such principles of law in this case.

6. Anti-Trust or Monopoly Laws of the United States are enactments of Congress and should in this case have been tried according to the intendments and for the purposes for which the Congress enacted them, that is, to be for the better enforcement of said laws, in aid of the Federal Gov-

ernment of the United States, the Trial Court and the Court of Appeals having failed to recognize and apply such principles of law in this case.

7. The Anti-Trust or Monopoly Laws of the United States are punitive in nature and their alleged violations charged to Respondent are a direct injury to the public, per se, and to Petitioner, the Trial Court and the Court of Appeals having failed to recognize and apply such principles of law in this case.

8. Inventions or improvements and the subject-matter thereof, taken in violation of confidential relationship in this case thus reposed in the Respondent violator charged therewith in Petitioner's Complaint, when put into the stream of interstate commerce with the intent and purpose to dominate, control, monopolize, or attempt to monopolize as charged, is alleged violations of the Anti-Trust or Monopoly Laws of the United States, which resulted in the great public injury and injury to Petitioner as a matter of law, per se, which the Trial Court and the Court of Appeals failed to recognize and apply such principles of law in this case. This would not only be patent infringement, as such acts not only come within the patent laws, but also come within, and/or, acts in violation of the Anti-Trust or Monopoly Laws.

9. The Decisions of the Trial Court and of the Court of Appeals in this case erred in deciding and holding that Paragraph 12 of Petitioner's Complaint is subject to "Motion To Dismiss" as a Motion To Dismiss was never before either the Trial Court or the Court of Appeals in the instant case as Respondent has at no time made or filed a Motion To Dismiss in the instant proceeding, but to the contrary Respondent made and filed a strict statutory "Motion To

Strike" in this case therefore such decisions are erroneous, discriminatory, and prejudicial to the rights of Petitioner in this civil action.

10. The Decisions of the Trial Court and of the Court of Appeals in this case erred in deciding and holding that Paragraph 12 of Petitioner's Complaint does not allege "(2) that it has been injured in its business or property by reason of said violation of the Anti-Trust Laws." (R. 140, 186-188).

11. Violations of the Anti-Trust or Monopoly Laws of the United States as charged to Respondent in Petitioner's Complaint hinders and prevents competition in inventions, the subject-matter thereof and/or the products thereof the same as any other property and is entitled to the protection of said laws, as such, from hindering and preventing Petitioner's predecessors and Petitioner from making license agreements thereon upon a just and fair basis as the owners of said inventions, the subject-matter and/or the products thereof, and Respondent is alleged to so hinder and prevent competition thereof in interstate commerce as clearly charged to Respondent by Petitioner's Complaint, the Trial Court and the Court of Appeals having failed to recognize and apply such principles of law in this case.

12. Violation of the Anti-Trust or Monopoly Laws of the United States are inherently, by their nature and character, to be enforced as a police power or regulation, and therefore, of great public interest, and a Writ of Certiorari should be granted in aid of said laws in this private anti-trust suit the same as in a government anti-trust suit, for the better protection of the public, as the public interest has been injured, per se, when violations of said laws occur as charged to Respondent by Petitioner's Complaint, the Trial

Court and the Court of Appeals having failed to recognize and apply such principles of law in this case.

13. By Respondent claiming to be the developer of the inventions, improvements, information and "know how", including drills or drilling bits now covered by Petitioner's Patents in suit by discovery through Respondent's purported research, which Respondent had prior knowledge of by receiving confidential disclosures from Petitioner, and known by Respondent to be Petitioner's inventions, improvements confidential information, and "know how" now covered by Petitioner's Patents in suit and/or the subject of application for patent thereon of petitioner's predecessor at the time pending in the United States Patent Office, Respondent with the intent and purpose to dominate, control, monopolize or attempt to monopolize said inventions, improvements, confidential information, and "know how" gained from Petitioner did wilfully and knowingly claim, as its own, and; did send such inventions, improvements, confidential information, and "know how" to others by mail or otherwise in interstate commerce to various parts of the United States claiming to be the discoverer of said inventions, improvements, confidential information and "know how" and/or including said drills or drilling bits which is a clear and specific act charged to Respondent by Petitioner's Complaint as a violation of the Anti-Trust or Monopoly Laws of the United States, the Trial Court and the Court of Appeals having failed to recognize and apply such principles of law in this case.

14. Respondent by hindering and preventing Petitioner's predecessors in right and title and Petitioner from making license agreements upon a fair and just basis on the inventions and improvements now covered by Petitioner's Patents

in suit and such allegations charging Respondent in Paragraph 12 of Petitioner's Complaint with violations of the Anti-Trust or Monopoly Laws of the United States is a clear allegation charging injury to the public, and, injury to the Petitioner, and, to Petitioner's business or property for which it is incorporated to do business in dealing with its patents and the granting of licenses on a royalty basis, which is, "injury to a business or property" contemplated by Title 15, U. S. C., Sec. 15, the Trial Court and the Court the Court of Appeals failed to recognize and apply such principles of law in this case.

15. The Decisions of the Trial Court and the Court of Appeals in this case are in direct opposition and conflict with decisions on the same questions of that of the decisions of other Courts of Appeals for other Circuits, and, by reason thereof the Supreme Court should settle the questions thus in conflict between said courts, therefore, Writ of Certiorari should be granted on the questions posed, that is, that Petitioner's Paragraph 12 is subject to Motion to Strike in that Petitioner has failed to allege any damage to its business or property within the meaning of "business or property" as those terms are used in Title 15, U. S. C., Section 15.

16. The Decisions of the Court of Appeals in this case are in direct opposition and conflict with decisions on the same questions with the decisions of the Supreme Court of the United States, and, therefore Writ of Certiorari should be granted on the questions posed, that is, "The averment of public injury in Paragraph 12 of the complaint is a bare conclusion on the part of the pleader.", as held by the Court of Appeals in this case (R. 204).

17. The Decisions of the Trial Court and the Court of Appeals in this case are not according to law.

18. The Decisions of the Trial Court and the Court of Appeals in this case are not just.

19. The Decision of the Trial Court and the Decision of the Court of Appeals in this case in affirming the Trial Court are in conflict with the statutory laws of the UNITED STATES CODE, Title 35, Sec. 261, in that, "Subject to the provisions of this title, patents shall have the attributes of personal property." Therefore, a patent such as Petitioner's Patents in suit as alleged in Paragraph 12 of Petitioner's Complaint is a property right within the meaning of Title 15, U. S. C., Sec. 15, the Trial Court and the Court of Appeals having failed to recognize and apply such principles of law in this case.

20. The Decisions of both the Trial Court and the Court of Appeals in this case are in error, as such decisions contravene the Constitution of the United States, (CONSTITUTION, Art. I, Sec. 8, Clause 3 and/or 8), and the law of the land, by holding that a patent is not "business or property" within the meaning of Title 15, U. S. C., Sec. 15, the Trial Court and the Court of Appeals having failed to recognize and apply such principles of law in this case.

21. The Decision of the Court of Appeals is in error in holding that "Paragraph 12 of Plaintiff's Complaint is fatally defective because it alleges no facts which show injury to the public." Rule 8 (a) of the FEDERAL RULES OF CIVIL PROCEDURE does not require allegations of "*fact*" since the deleting amendment of March 1948, the Court of Appeals having failed to recognize and apply such principles of law in this case.

22. The Trial Court or the Court of Appeals failed to give effect and consideration to the specific allegations in

Paragraph 12 of Petitioner's Complaint, that the inventions and improvements of Petitioner's Patents in suit given by Petitioner's predecessor and Petitioner to Respondent in confidence and put by Respondent "in commerce among the several states or in interstate commerce with the intent and purpose to dominate, control, monopolize or attempt to monopolize.", is in direct violation of the Anti-Trust or Monopoly Laws for which treble damages is mandatory for such violations as charged to Respondent in said Paragraph 12 of Petitioner's Complaint, the Trial Court and the Court of Appeals having failed to recognize and apply such principles of law in this case.

23. The Court of Appeals erred in this case in deciding and holding as follows: "If the evidence sustains the Plaintiff's averments on its first four claims, the Plaintiff can recover all of the actual damages to which it is entitled." Petitioner is entitled to all actual damages for all claims recognized by law, including Petitioner's Claims of Respondent's alleged violations of the Anti-Trust or Monopoly Laws, and Petitioner is entitled to have each of its claims heard in its complaint and to prove actual damages in each of its alleged claims made in its complaint and to prove actual damages in each of its alleged claims in a multiple claim suit and cannot be limited or barred from recovering all such actual damages by the Court below, which is contrary to law, and is dictatorial, arbitrary and prejudicial to Petitioner's rights, in this suit, and, is a cursory dismissal of Petitioner's Anti-Trust Claims, which violates the "due process of law" provisions (CONSTITUTION, Art. V and Amendment V thereof), the Court of Appeals having failed to recognize and apply such principles of law in this case.

24. The Decisions of the Trial Court and of the Court of Appeals in this case erred in deciding and holding that

Paragraph 12 of Petitioner's Complaint "fails to state a claim upon which relief can be granted and that being true, the allegations contained in said paragraph are immaterial and irrelevant", which the Trial Court and the Court of Appeals failed to recognize and apply such principles of law in this case.

25. The Decisions of the Trial Court and of the Court of Appeals in this case erred in deciding and holding that Paragraph 12 of Petitioner's Complaint is insufficient and does not allege a claim upon which relief can be granted, and holding upon different grounds and upon different reasons, and this is particularly unjust to Petitioner in that both decisions are erroneous and amount to holdings that all specific allegations in Paragraph 12 of Petitioner's Complaint when taken together do not allege a broad unlawful plan to monopolize taking on a coloring of a general plan or scheme to injure the public and this Petitioner as set out in Paragraph 12 of Petitioner's Complaint, the Trial Court and the Court of Appeals having failed to recognize and apply such principles of law in this case.

26. The Decision of the Trial Court and the affirming Decision of the Court of Appeals in this case, are in error in deciding and holding that Paragraph 12 of Petitioner's Complaint does not allege specific allegations of violations of the Anti-Trust or Monopoly Laws of the United States showing that the pleader has alleged a claim therefor upon which relief can be granted, in that, the Trial Court recognized said Paragraph 12 of its Original Memorandum Order (R. 140, 186-188) and so stated that "It appears from the pleading that Paragraph 12 of the complaint is, in effect, a count under which the plaintiff seeks to make a claim for treble damages under Section 15, Title 15, U. S. C. A. and

plaintiff's counsel so admitted during the oral argument on the motion to strike", and, the Court of Appeals affirmed the Trial Court's Decision, so, both Courts recognized said Paragraph 12 as having been sufficient as to notice giving, which is all that is required in Rule 8 (a) of the FEDERAL RULES OF CIVIL PROCEDURE, a claim showing that the pleader is entitled to relief, notwithstanding the Trial Court and the Court of Appeals recognition of such allegation, as notice giving, and, good according to the standards of Rule 8 (a), said Courts having refused to abide by such Rule 8 (a) and apply the law thereof correctly in this case.

27. The Decisions of the Trial Court and of the Court of Appeals in this case erred in deciding and holding that Paragraph 12 of Petitioner's Complaint does not allege "(1) specific violation of the anti-trust laws" (R. 140), which is in direct conflict with the specific allegations set forth in Paragraph 12 of Petitioner's Complaint (R. 8-12), the Trial Court and the Court of Appeals having failed to recognize and apply such principles of law in this case.

28. The Decisions of the Trial Court and of the Court of Appeals in this case, are in error and amounts to discrimination against Petitioner and its property rights, its inventions and improvements covered by Petitioner's Patents in suit, the Trial Court and the Court of Appeals having failed to recognize and apply such principles of law in this case.

29. The Decisions of the Trial Court and the Court of Appeals in this case are both inconsistent with each other and the law by so deciding and holding and failing to recognize and apply the correct principles of law in this case.

30. The Decisions of the Trial Court and the Court of Appeals in this case failed to recognize the allegations con-

tained in Paragraph 12 of Petitioner's Complaint alleging domination and control by monopolizing, and, domination and control by attempting to monopolize the inventions and improvements covered by Petitioner's Patents in suit which allegations are specifically alleged as violations of the Anti-Trust Laws or Monopoly Laws of the United States, the Trial Court and the Court of Appeals having failed to recognize and apply such principles of law in this case.

Federal Rules of Civil Procedure, Statutes and Constitution of the United States Are Involved

The Federal Rules of Civil Procedure involved are, Rule 8(a) a plain short statement of the claim showing that the pleader is entitled to relief, and Rule 8 (e) (2) Multiple Claim Rule; Motion to Dismiss, Rule 12(b) (6), failure to state a claim upon which relief can be granted; and, Motion to Strike, Rule 12(f) redundant, immaterial, impertinent, or scandalous matter.

The statutory provisions involved are, Title 15, U. S. C., Sections 1, 2 and 15; Title 35, U. S. C., Section 261.

The constitutional provisions involved are, Article 1, Section 8, Clause 3 and/or 8; Article V; and, Amendment V to the CONSTITUTION OF THE UNITED STATES OF AMERICA.

Statement

Petitioner's Complaint was filed against Respondent on April 6, 1954 (R. 1). The jurisdiction of the District Court was invoked because the case arises under the Patent Laws of the United States, and the Unfair Competition, and for violation of the Anti-Trust or Monopoly Laws of the United

States. (U. S. C., Title 28, Sections 1337, 1338(a), 1338(b), and 1400(b); Title 35, Sections 281 and 283, and Title 15, Sections 1, 2 and 15). On May 29, 1953 Respondent filed "Motion to Strike" (R. 15), the Anti-Trust Claims contained in Paragraph 12 of the Complaint, and on June 13, 1953 Petitioner made Reply (R. 26) to said "Motion to Strike". On June 25, 1953, said "Motion to Strike" was submitted on Oral Argument (R. 114) and June 27, 1953 Memorandum Order of the Court (R. 140) resulted in Court sustaining Respondent's "Motion to Strike" the Anti-Trust Claims contained in Paragraph 12 of said Complaint. On July 11, 1953 Plaintiff's "Motion for Reconsideration and for Rehearing" (R. 142) was filed to set aside the Court's Decision. On July 18, 1953 Petitioner filed "Motion to Alter or Amend Court's (R. 183) order or Judgment Sustaining Defendant's Motion to Strike Paragraph 12 of Complaint." On August 3, 1953 the Court made Memorandum Order (R. 187) and on August 22, 1953 signed and entered Order (R. 186) as of July 9, 1953, and, Order Denying Motion for Reconsideration and for Rehearing "Motion to Strike", and, Granting in Part, and Denying in Part, Petitioner's Motion to Alter or Amend the Court's Order (R. 188), sustaining Defendant's Motion to Strike Paragraph 12 of Complaint. On August 27, 1954, "Notice of Appeal" was filed (R. 190) together with "Bond for Costs on Appeal" on August 27, 1954 (R. 191). On August 28, 1953 "Statement of Points on Appeal" was filed (R. 193). Thereafter, oral argument was had in proceeding on "Argument and Submission" (R. 200) in the United States Court of Appeals for the Fifth Circuit on June 3, 1954, resulting in, an "opinion of the Court" (R. 201) filed July 21, 1954 in which the decision of the District Court was affirmed sustaining "Motion to Strike" Paragraph 12 of the Complaint on July 21, 1954,

"Judgment" (R. 211) was made and entered by said Court of Appeals. On August 6, 1954 "Petition for Rehearing" (R. 212) was filed, and, on August 31, 1954 "Order Denying Rehearing" (R. 232) (no opinion rendered) was made and entered of record, from which this Petition for Writ of Certiorari is made.

The Court below affirmed the orders of the District Court upon different grounds and upon different reasons, and, would not pass upon vital questions which should be settled by this Court, as well as, resolving conflicts between the decision of the Court of Appeals below and its own former decisions, and, in conflict with other Courts of Appeals and of the Supreme Court upon the questions passed upon by said court. That questions of great public interest and importance have been raised and it is imperative that such questions be settled by this Court, in that, the public interest has been injured by reason of violations of the Patent Laws, and, the Anti-Trust or Monopoly Laws have been violated, as well as injury and damage done to the Petitioner of such magnitude as to shock the conscience of this Court.

Reasons for Granting the Writ

1. The decisions of the courts below exceeded their jurisdictions in the instant case as the Trial Court and the Court of Appeals made final decisions (R. 140, 186-188, 201-210) passing upon the sufficiency of the anti-trust claims set forth in Paragraph 12 of Petitioner's Complaint (R. 8-12) when the only question put in issue was Respondent's strict statutory "Motion to Strike," (FRCP, Rule 12(f)), as the sufficiency of the complaint could only be reached through a proper "Motion to Dismiss," (FRCP, 12(b) (6)),

which contravenes the Federal Rules of Civil Procedure above, Statutory provision Title 35, U.S.C., Section 261, and, Constitution of The United States, Article V, and, Amendment V.

Federal jurisdictional and procedural issues. (Italics ours). The Supreme Court holds the prime responsibility for the proper functioning of the federal judiciary. It frequently accepts cases for review on writs of certiorari which reflect that responsibility in the fields of federal jurisdiction, practice, and procedure. Such cases qualify for review by reason of their importance, novelty or difficulty, with a conflict of decisions also playing a significant role.

Among the many cases falling within this category are those involving the jurisdiction of the federal district courts (BRUNER v. UNITED STATES, 343 U.S. 112), the administration of criminal justice in federal courts (MCNABB v. UNITED STATES, 318 U.S. 332, 341), the construction of the federal rules of civil and criminal procedure (HICKMAN v. TAYLOR, 329 U.S. 495; UPSHAW v. UNITED STATES, 335 U.S. 410).

2. The decision of said Court of Appeals as to the sufficiency of the Anti-Trust Claims set-forth in Paragraph 12 of Petitioner's Complaint is in direct conflict with the decisions of the same Court of Appeals for the Fifth Circuit and other Court of Appeals as well as U. S. Supreme Court on the questions of the sufficiency of a complaint.

JUSTICE BLACK, speaking for the United States Supreme Court, in the case of UNITED STATES v. EMPLOYING PLASTERER'S ASS'N OF CHICAGO, ET AL. (March 8, 1954), 74 S. Ct. 452, 453, 454, held:

> "The District Court did not question that the foregoing and other factual allegations showed a combina-

tion to restrain competition among Chicago plastering contractors. But the court considered these allegations to be 'wholly a charge of local restraint and monopoly,' not reached by the Sherman Act. And the court held that there was no allegation of fact which showed that these powerful local restraints had a sufficiently adverse effect on the flow of plastering materials into Illinois. At this point we disagree. The complaint plainly charged several times that the effect of all these local restraints was to restrain interstate commerce. Whether these charges be called 'allegations of fact' or 'mere conclusions of the pleader,' we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried."

In the case of KOHLER, ET AL., v. JACOBS, ET AL., (5th Cir.) 138 Fed. 2d 440, at page 441, held:

"* * * the allegations ought to be given a fair construction to come at the case intended to be stated * * *",

Citing DELOACH v. CROWLEY, (5th Cir.) 128 F. 2d 378, held:

"* * * plaintiff has the right to try to prove its case, whether it can or not * * *;"

STANOLIND v. ATLANTIC COAST LINE R. Co. (5th Cir.), 192 F. 2d 432, at pages 433 and 434, held:

"* * * In considering a motion to dismiss the complaint for failure to state a claim upon which relief can be granted, we must treat very well pleaded material allegation of the complaint as admitted."

Citing TAHIR ERK v. GLENN L. MARTIN CO., (4th Cir.) 116 F. 2d 865.

"Cases are generally to be tried on their proofs rather than on the pleadings and there was no justification for granting the motion to dismiss the complaint for failure to state a claim unless the averments in the pleading attacked disclosed with certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim. Liemer v. State Mutual Life Assur. Co., (8th Cir.) 108 F. 2d 302; Kohler v. Jacobs, (5th Cir) 138 F. 2d 440; Carroll v. Morrison Hotel Corp., (7th Cir.) 149 F. 2d 404; Ware v. Travelers Ins. Co., (9th Cir.) 150 F. 2d 463; Dallas v. Land, 81 U.S. App. DC. 28, 154 F. 2d 307; Frederich Hart & Co. v. Recordgraph Corp.; (3rd Cir.) 169 F. 2d 580. The test is whether the complaint, construed in the light most favorable to the plaintiff and with every intendment regarded in his favor, is sufficient to constitute a valid claim. Tahir Erk v. Glenn L. Martin Co., Supra."

TAUZIN v. SAINT PAUL MERCURY INDEMNITY CO., (5th Cir.) 195 F. 2d 223, at page 224, held:

"We are of the opinion that the District Court erred. It would seem that plaintiff has stated enough to withstand a mere formal motion directed only to the face of the complaint. The courts have repeatedly said there is no justification for dismissing a complaint for insufficiency except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim pleaded. If the facts alleged in the complaint reveal that a plaintiff is entitled to any kind of relief, it is sufficient and should not be dismissed."

John Walker & Sons, Limited v. Tampa Cigar Co., Inc., (5th Cir.) 197 F. 2d 72; Cronelin v. United States (5th Cir.) 177 F. 2d 275; Hilliard v. Brown (5th Cir.) 170 F. 2d 397; Rose v. Rose, (5th Cir.)

162 F. 2d 587; Knox v. Ingalls Shipbuilding Corp., (5th Cir.) 158 F. 2d 973; Mitchell v. Wright, (5th Cir.) 154 F. 2d 924;

In opinion of Judge Rives in the case of DesIsles v. Evans et al., (5th Cir.) 200 F. 2d 614, citing, Vol. 2, Morris Federal Practice, 2nd Ed., Sec. 8.13, p. 1653. See also Sec. 12.08, p. 2245; As well stated by Judge Sibley speaking for this Court (5th Cir.) in DeLoach v. Crowley's Inc., 128 F. 2d 378, 380, under the Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than on the pleadings.

Callaway v. Hamilton National Bank of Washington, et al., U.S. App. D.C., 195 F. 2d 556, citing, Dioguardi v. Durning, (2nd Cir.) 139 F. 2d 774; Dennis v. Village of Tonka Bay (8th Cir.) 151 F. 2d 411; Dallas v. Land, 81 U.S. App. D.C. 28, 154 F. 2d 307, affirmed 330 U.S. 731, 57 S. Ct. 1009, 91 L. Ed. 1209; Sarton v. Arkansas Gas Corp., 321 U.S. 620, 63 S. Ct. 724, 88 L. Ed. 967; National Used Car Market Report, Inc. v. National Automobile Dealers Ass'n et al., 200 F. 2d 359; Chicago and Northwestern Ry. v. First National Bank of Wankegan, 200 F. 2d 383 at page 384 held:

"A complaint is not subject to dismissal unless it appears to a certainty that the plaintiff cannot *possibly* (emphasis ours) be entitled to relief under any set of facts which could be proved in support of its allegations."

3. The decisions of the courts below as to inventions and or improvements and/or Patents or the subject-matter thereof holding that same are not property rights within the meaning of "business or property" as those terms are

used in Title 15, U.S.C. Section 15, involves an important question of federal law which is of great public interest and importance which has not been specifically decided but should be, settled by this court (Rule 19(b), SUPREME COURT, REVISED RULES, effective July 1, 1954).

However, the new Patent Codification Act, effective January 1, 1953, (Pocket Part of Title 35, U.S.C., Sec. 261) is as follows:

Sec. 261, OWNERSHIP; Assignment—

"Subject to the provisions of this title, patents shall have the attributes of personal property."

The Supreme Court has held that inventions, applications for patents, and patents are "property", citing, the following cases:

In WALKER ON PATENTS, Deller's Ed., Vol. Two, Sec. 234, pages 1188, 1189, and 1190 it is stated:

"PATENTS AS PROPERTY."

"Patent rights are property (Brown v. Duchesne, 19 How. (60 U.S.) 183, 195, 15 L. Ed. 595; Seymour v. Osborne, 11 Wall. (78 U.S.) 516, 533, 20 L. Ed. 33; Consolidated Fruit Jar Co. v. Wright, 94 U.S. 92, 96, 24 L. Ed. 68; Cammeyer v. Newton, 94 U.S. 92, 96, 226, 24 L. Ed. 72; James v. Campbell, 104 U.S. 356, 358, 26 L. Ed. 786 (1882); Marsh v. Nichols, 128 U.S. 605, 612, 32 L. Ed. 538 (1888); Continental Paper Bag Co., v. Eastern Paper Bag Co., 210 U.S. 405, 424, 52 L. Ed. 1122 (1908); Nelson v. Ferguson, 56 F. 2d 121, C.C.A. 3 (1932), cert. den. 286 U.S. 565, 76 L. Ed. 1297; M. J. Lewis Products Co. v. Lewis, 57 F. 2d 886, 887, D.C., Pa. (1931); Standard Stoker Co. v.

Lower, 46 F. 2d 678, 681, D.C., Md. (1931); Curtiss Aerocar Co. v. Springer, 81 F. 2d 668, 669, C.C.A. 5 (1936); U. S. v. Dubilier Condenser Corp., 289 U.S. 178, 187; 77 L. Ed. 1114 (1933))"

"The owner of a patent is both legally and equitably entitled to the same protection for that property, that the owner of any other species of property may enjoy (McCormick Mach. Co. v. Aultman, 169 U.S. 606, 609, 42 L. Ed. 875 (1898); Cramp & Sons S. & E. B. Co. v. Int. Curtis Marine Turbine Co., 246 U.S. 28, 39-40, 62 L. Ed. 560 (1918))".

The Supreme Court of the United States, in a decision by Judge Brown, in the case of McCORMICK HARVESTING MACHINE CO. v. C. AULTMAN & CO., ET AL., 18 S. Ct. 442, at page 444, 169 U.S. 606, at pages 608 and 609, in speaking of a patent that has been duly issued, held:

"It has been the property of the patentee, and as such is entitled to the same legal protection as other property." (Citing other Supreme Court decisions.)

Justice Clifford, speaking for the Supreme Court of the United States, in the case of WILLIAM H. CAMMEYER, ET AL., APPTS. v. JOHN NEWTON, ET AL., 24 L. Ed. 72, 94 U.S. 225, held:

"Holders of valid letters patent enjoy, by virtue of same, the exclusive right and liberty of making and using the invention therein secured, and of vending the same to others to be used, as provided by the Act of Congress; and the rule of law is well settled, that an invention so secured is property in the holder of the patents, and that as such the right of the holder is

as much entitled to protection as any other property, during the term for which the franchise or the exclusive right or privilege is granted."

The Supreme Court of the United States, in the case of CONTINENTAL PAPER BAG CO. v. EASTERN PAPER BAG CO., 28 S. Ct. 748, at page 754, 210 U.S. 405, at page 425, in a decision by Justice McKenna, held:

> "It may be said that these cases deal only with the right of a patentee, and not with the remedy, whether at law or equity, that he may, at any time, or in all situations, be entitled to. And there is no case in this court that explicitly does so. However, in the three last cases cited it was decided that patents are property, and entitled to the same rights and sanctions as other property." (The cases referred to are all decisions of the Supreme Court of the United States)."

4. The decision of said Court of Appeals as to pleading "conclusions" in a private anti-trust suit, by holding "The averment of public injury in Paragraph 12 of the complaint is a bare conclusion of the pleader" (R. 204), is a decision of a federal question in a way in direct conflict with applicable decisions of this court (Rule 19(b), the Supreme Court, Revised Rules, effective July 1, 1954).

Justice Black, in the case of UNITED STATES v. EMPLOYING PLASTERER'S ASS'N OF CHICAGO, ET AL., 74 S. Ct. 452, 453, 454, held:

> "The District Court did not question that the foregoing and other factual allegations showed a combination to restrain competition among Chicago plastering contractors. But the court considered these allegations to be 'wholly a charge of local restraint and monopoly', not reached by the Sherman Act. And the court held

> that there was no allegation of fact which showed that these powerful local restraints had a sufficiently adverse effect on the flow of plastering materials into Illinois. At this point we disagree. The complaint plainly charges several times that the effect of all these local restraints was to restrain interstate commerce. Whether these charges be called 'allegations of fact' or 'mere conclusions of the pleader', we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried."

5. The Decisions of the Trial Court and the Court of Appeals as to stretching and extending a strict statutory "Motion to Strike" (FRCP, Rule 12(b) (6), and, then making a final Decision and Judgment thereon (R. 140, 186-188, 201-210, and 211), amounting in effect, to a "Summary Judgment", precluding Petitioner from having its anti-trust claims tried on the merits instead of the pleadings, by so holding, both courts below have so departed from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by a lower court, as to call for an exercise of this court's power of supervision (Rule 19(b), Supreme Court, Revised Rules effective July 1, 1954), and, such actions by such lower courts in holding and deciding amount to a violation of the "due process of law" provisions of Article V, and, Amendment V of the CONSTITUTION OF THE UNITED STATES OF AMERICA.

Conclusion

For the foregoing reasons, this petition for a Writ of Certiorari should be granted, and, it is respectfully requested that your petitioner may be permitted by the Court to present this case on oral argument at this term of the Court

as respectfully prayed for in Petitioner's "Motion to Advance."

Respectfully submitted,

William E. Kinnear

WILLIAM E. KINNEAR,
321 American National Bank Bldg.
Beaumont, Texas
Counsel for Petitioner

Dated: October 18, 1954.

Proof of Service

I, WILLIAM E. KINNEAR, Counsel for Kinnear-Weed Corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby Certify that, on the 18th day of October, 1954, I served copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the United States on Humble Oil and Refining Company, Respondent, by mailing the required copies in a duly addressed envelope by registered air mail, return receipt requested, postage prepaid, to Mr. Nelson Jones, Esq., Counsel for Respondent, Post Office Box 2180, Houston, Texas.

Dated: October 18, 1954.

William E. Kinnear

WILLIAM E. KINNEAR,
321 American National Bank Bldg.,
Beaumont, Texas,
Counsel for Petitioner

[fol. 24] OPINION OF THE COURT—Filed July 21st, 1954

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14777

KINNEAR-WEED CORPORATION, Appellant,

versus

HUMBLE OIL & REFINING COMPANY, Appellee

Appeal from the United States District Court for the Eastern District of Texas

(July 21, 1954)

Before Hutcheson, Chief Judge, Rives, Circuit Judge, and Dawkins, District Judge

RIVES, Circuit Judge:

The complaint was based upon five separate claims: (1) infringement of patents, (2) violation of a confidential relationship, (3) unjust enrichment, (4) unfair competition, [fol. 25] (5) for the recovery of threefold damages[1] for violation of Section 2 of the Sherman Act.[2] Upon this

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[1] 15 U.S.C.A. 15—"*Suits by persons injured; amount of recovery.* Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2] 15 U.S.C.A. 2.—"*Monopolizing trade a misdemeanor; penalty.* Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

appeal we are concerned only with the last claim, the one for violation of the antitrust or monopoly laws. That claim was presented by paragraph 12 of the complaint.[3] The district court sustained the defendant's motion to strike said paragraph 12, and, pursuant to Rule 54(b), Federal Rules of Civil Procedure,[4] the court determined "that since Paragraph 12 presents a claim for relief separate and apart from the other claims presented in plaintiff's complaint, there is no just reason for delay in having a final decision made as to whether the allegations in said Paragraph 12 state a claim for treble damages under Section 15, Title 15, U.S.C.A.", and directed the entry of a final judgment from which this appeal is prosecuted.

[fol. 26] If the evidence sustains the plaintiff's[5] averments on its first four claims, the plaintiff can recover all of the actual damages to which it is entitled. In its claim for treble damages in paragraph 12, the plaintiff seeks a windfall on account of an alleged violation of the antitrust laws. The main purpose of those laws was to protect the public from monopolies and restraint of trade, and the private right of action for treble damages was incidental and subordinate to that main purpose. *Glenn Coal Co. v. Dickinson*

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[3] Paragraph 12 of the complaint is annexed as an appendix to this opinion.

[4] Rule 54(b), Federal Rules of Civil Procedure:

"*Judgment upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

[5] For convenience, the parties will be referred to simply as plaintiff and defendant.

Fuel Co., 4th Cir., 72 F. 2d 885, 889. The grant of a claim for treble damages to persons injured was for the purpose of multiplying the agencies which would help enforce the antitrust laws and therefore make them more effective. *Maltz v. Sax*, 7th Cir., 134 F. 2d 2, 4. The very foundation of the right of a private suitor to recover "threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee" is the violation of public rights prohibited by the Act and, indeed, made criminal offenses. 15 U.S.C.A. 1, 2 (see footnote 2, *supra*).

Public injury alone justifying the threefold increase in damages and being an indispensable constituent of a claim for violation of the antitrust laws, a general allegation of such injury is not sufficient. It is essential that the complaint allege facts from which it can be determined that the conduct charged to be in violation of the antitrust laws was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce. *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 493; *Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165, 174; *Fed-*
[fol. 27] *derson Motors v. Ward*, 10th Cir., 180 F. 2d 519; 522; *Dublin Distributors, Inc. v. Edward & John Burke Limited*, D.C. S.D. N.Y., 109 F. Supp. 125, 127; *National Used Car M. Report v. National Auto D. Ass'n.*, D.D.C., 108 F. Supp. 692, 694; *Bader v. Zurich General Accident & Liability Ins. Co.*, D.C. S.D. N.Y., 12 F.R.D. 437, 439.

The averment of public injury in paragraph 12 of the complaint is a bare conclusion of the pleader: "And that such acts and conduct by defendant in attempting to, and by, establishing and maintaining such a monopoly has resulted in prejudicial consequences to the public interest whereby the public interest has been injured." It is true that the conduct charged to the defendant was in fact antagonistic to the purpose of the patent laws, and that that purpose is a public purpose, "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries", Constitution Art. I Sec. 8, Clause 8. That, however, is not the kind of public purpose protected by the antitrust laws, which are designed instead to protect the free flow of interstate commerce. Indeed, to

an extent the two purposes conflict. But for the beneficent purpose of encouraging invention, the limited monopoly granted by a patent might itself be contrary to the spirit of the antitrust laws. It is significant also that, while violations of the antitrust laws have been made criminal offenses, Congress has not declared patent infringement even willfully committed, to constitute a crime. Every fact averred in paragraph 12 of the complaint might be true, and yet the inventions or improvements of drilling bits or drills [fol. 28] covered by the plaintiff's patents might not have been restrained from the free flow of interstate commerce. Indeed, for aught that appears, the defendant's conduct may have increased the flow of such products in commerce.

Paragraph 12 of the complaint is fatally defective because it alleges no facts which show injury to the public. It is not necessary to decide whether it is defective in the several other particulars urged by the defendant.[6]

The allegations of paragraph 12 have no proper place in the trial or disposition of the other claims upon which the suit is based, and might serve to prejudice the defendant or to prolong the trial. The district court did not err, therefore, in sustaining the defendant's motion to strike paragraph 12.[7]

Affirmed.

[fol. 29] APPENDIX

Paragraph 12 of the Complaint:

"That defendant is one of the largest producers of oil in the United States and engages in interstate commerce on a big scale in the drilling, production and sale of petroleum products in that it transports oil well drilling equipment and oil and gas storage equipment in the regular

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[6] Such as that it alleges no injury to any business or property of plaintiff, that a patent is not trade or commerce within the meaning of the Sherman Act, that it is legally impossible to monopolize a patent in violation of the Sherman Act.

[7] See 2 Moore's Federal Practice, 2nd ed., Sec. 12.21, pp. 2312, et seq.

course of its usual business, and transports and has transported, oil and other petroleum products by truck, railroad and pipe lines from the State of Texas to various other states and sections of the United States, and from other states to various other sections of the United States, and sells oil and other petroleum products in a number of states, the exact number not being known to plaintiff, and often drills oil and gas wells in at least several states of the United States. That defendant by reason of its great volume of oil well drilling equipment, including drills or drilling bits, which it purchases, the economic position of oil well drilling equipment manufacturers is greatly affected by the distribution of defendant's patronage. That defendant has had a policy for the past several years of sending its engineers, who have been under contract with defendant to assign their inventions and applications for Letters Patent to the Standard Oil and Development Co., a Delaware Corporation, which is a research and development Company, or to defendant, out to various manufacturers of oil well drilling and completion equipment and by representing that defendant wishes to evaluate and compare said equipment, in order to determine whether defendant wishes to use same in the drilling and controlling of its oil wells. That defendant represented that such information received [fol. 30] would be held in confidence. That defendant then uses such information in its standards and specifications in its universal system of purchasing oil well drilling and control equipment, and in its engineering reports. That in determining what equipment is to be used by defendant in its purchasing and use of oil well equipment defendant considers only what equipment is most suitable for defendant's needs and the price of same. That defendant does not consider whether said equipment which it has taken in confidence from said manufacturers is patented or unpatented, and does not consider or give credit to the inventor or discoverer of such patented equipment. Defendant sends out its standards and specifications and engineering reports, which it keeps current, and which includes descriptions of the equipment received in confidence from such manufacturers, without any recognition of patent rights and without any restrictions or limitations relative to the manufacture,

sale or use of such patented equipment. That defendant has so embodied the inventions or improvements covered by plaintiff's patent in this action. That defendant has represented by its advertising in its own publication and by articles in its own and other publications which have been sent out in interstate commerce to various parts of the United States by mail that defendant is the discoverer or inventor of the drills or drilling bits, the inventions or improvements included and covered by plaintiff's patents in this action.

"That defendant has wrongfully represented to manufacturers of oil well drilling equipment that defendant is the inventor or discoverer of said drills or drill bits which are the subjects of plaintiff's patents in this action and has caused manufacturers to manufacture said drills or drilling [fol. 31] bits for defendant according to the standards and specifications of defendant and to sell same to defendant, and defendant has used same in the drilling of many of its oil and gas wells. That defendant by its wrongful appropriation and domination of said improvements or inventions which are the subjects of and are covered by plaintiff's patents has been wrongfully conducting itself by said acts of wrongful appropriation and domination and control of said improvements or inventions covered by plaintiff's patents in this action and that such conduct of defendant was for the purpose of monopolizing the inventions or improvements covered by plaintiff's patents in this action.

"That defendant did willfully conduct itself as aforesaid with the intent to appropriate, dominate and control said improvements or inventions covered by, and which are the subjects of plaintiff's patents in this action and thus did attempt to have a monopoly on said improvements or inventions which are the subject of plaintiff's patents in this action. And that by such wrongful conduct defendant has to a large extent hindered and prevented plaintiff and plaintiff's predecessors in right, title and interest in said patents from controlling and enjoying the benefits of same as is provided by law, including the right to grant licenses upon a fair and just basis without wrongful interference and hindrance by defendant as aforesaid in so doing. That defendant by its wrongful conduct as aforesaid has restrained and prevented plaintiff and plaintiff's predecessors

in right, title and interest in said improvements or inventions, in fully benefiting and enjoining rights granted by the United States Government in said patents.

[fol. 32] "Defendant has followed a course of conduct with the intent and purpose of establishing and maintaining its monopolistic control of said improvements or inventions in commerce among the several states or in interstate commerce, and has substantially succeeded in doing so. And that such acts and conduct by defendant in attempting to, and by, establishing and maintaining such a monopoly has resulted in prejudicial consequences to the public interest whereby the public interest has been injured. And that plaintiff's predecessors in rights, title and interest in said improvements or inventions and in said Letters Patents and plaintiff, have suffered damages proximately resulting from the acts and conduct of defendant which constitute the violations of the monopoly or antitrust laws of the United States of America.

"That said acts of defendant were and are in violation of the antitrust laws of the United States. That during the entire period of said acts of misconduct by defendant which were in violation of said antitrust or monopoly laws the defendant had, and now has, an agent in Jefferson County, Texas, and agents in other places in the district of the United States District Court for the Eastern District of Texas, Beaumont Division. That as a result and proximate cause of the wrongful acts of defendant in attempting to, and substantially monopolizing said improvements or inventions which are the subjects of plaintiff's patents in this action as alleged aforesaid the value of said improvements or inventions the subject of said patents and the said patents of plaintiff's in this action were substantially destroyed to plaintiff's and plaintiff's predecessors in right, title and interest in and to said inventions or improvements and said [fol. 33] patents of plaintiff in this action in the sum of Twenty-five Million Dollars, ($25,000,000.00)."

[fol. 34] JUDGMENT

Extract from the Minutes of July 21st, 1954.

No. 14777

KINNEAR-WEED CORPORATION

versus

HUMBLE OIL & REFINING COMPANY

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Kinnear-Weed Corporation, and the surety on the appeal bond herein, American Bonding Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 35] ORDER DENYING REHEARING

Extract from the Minutes of August 31, 1954.

No. 14777

KINNEAR-WEED CORPORATION

versus

HUMBLE OIL & REFINING COMPANY

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.